

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Assessment and Collection of Regulatory
Fees for Fiscal year 1999

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MD Docket No. 98-200

**PETITION FOR RECONSIDERATION OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. THE COMMISSION SUMMARILY DISMISSED CTIA's COMMENTS WITHOUT ADEQUATELY EXPLAINING ITS REASONING.....	3
A. The Correct Number Of CMRS Subscriber Units As Of December 31, 1998 Is 69.2 Million.....	3
B. Minimum Standards Of Administrative Law Require The Commission To Explain The Basis For Its Decisions.	9
III. CONCLUSION	11

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The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits this
Petition for Reconsideration in the above captioned proceeding.²

I. INTRODUCTION

The Commission is permitted to collect regulatory fees only in the amount expressly
authorized by Congress. The Report and Order establishes the FY 1999 regulatory fees required
under section 9 of the Act³ to be paid by all industries the agency regulates. As required by
Congress, the Commission's Report and Order prescribes regulatory fees for FY 1999 that raise
an additional 6 percent above the total amount of fees collected for FY 1998. For CMRS mobile

¹ CTIA is the international organization of the wireless communications industry for both
wireless carriers and manufacturers. Membership in the association covers all Commercial
Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50
largest cellular and broadband personal communications service ("PCS") providers. CTIA
represents more broadband PCS carriers and more cellular carriers than any other trade
association.

² Assessment and Collection of Regulatory Fees for Fiscal Year 1999, MD Docket No. 98-
200, *Report and Order*, FCC 99-146 (rel. June 18, 1999) ("Report and Order").

³ 47 U.S.C. § 159.

services, the Report and Order raised regulatory fees from \$0.29 to \$0.32 per subscriber, an increase of over 10 percent.

In its Comments to the Notice of Proposed Rulemaking ("Notice") in this proceeding, CTIA objected to the \$0.32 per subscriber fee the Commission proposed imposing on CMRS Mobile Services.⁴ CTIA showed that the proposed fee was based on the same number of CMRS subscribers – 55.5 million -- that the Commission used to calculate CMRS fees for FY 1998, even though a number of widely available expert studies, as well as the FCC's own Chairman, all agreed that "there are over 68 million Americans who own a mobile phone."⁵ In addition to erroneously assuming that the rapidly growing wireless industry experienced zero growth in 1998, CTIA also indicated that the Commission violated section 9(i) by impermissibly imposing a disproportionate share of the regulatory fees on the most rapidly growing sectors of the telecommunications industry.⁶

The Report and Order is burdened by factual errors that compel Commission reconsideration, and a significant downward adjustment of the CMRS regulatory fees for FY 1999. The Commission's analysis of CTIA's arguments is woefully inadequate and patently arbitrary. Most egregious is the continued insistence that there are only 55,540,000 CMRS mobile services units. With nothing more than an *ipse dixit*, and not a single citation to the "several sources" it used to make its calculations, the Commission maintained its incorrect

⁴ See Assessment and Collection of Regulatory Fees for Fiscal Year 1999, MD Docket No. 98-200, CTIA Comments (filed Apr. 1, 1999).

⁵ See CTIA Comments; at 7-8; Chairman William E. Kennard, *Crossing Into the Wireless Century*, New Orleans, LA (at CTIA's Wireless '99 Convention), Feb. 9, 1999.

⁶ 47 U.S.C. § 159(i).

estimate of the number of CMRS payment units proposed in the Notice. What originally appeared to be a simple mistake in the Notice now has become an insupportable regulation. Moreover, the Commission's summary dismissal of CTIA's opposition to the methodology utilized by the Commission fails to satisfy the most basic standards of reasoned administrative decisionmaking. Given these deficiencies in the Report and Order, the Commission is obliged to correct its errors on reconsideration.

II. THE COMMISSION SUMMARILY DISMISSED CTIA's COMMENTS WITHOUT ADEQUATELY EXPLAINING ITS REASONING.

A. The Correct Number Of CMRS Subscriber Units As Of December 31, 1998 Is 69.2 Million.

The Commission requires each CMRS carrier to make its regulatory fee payment based on the number of its subscribers. The Commission, therefore, not only calculates an industry-wide obligation, in this case \$17,453,324 for CMRS mobile services, it also estimates the number of subscribers and imposes a per-subscriber fee on each carrier.⁷ As a result, if the Commission underestimates the total number of subscriber units, that industry would pay regulatory fees in excess of the amount due as calculated by the Commission. In this instance, the Commission proposed in the Notice and adopted in the Report and Order a fee of \$0.32 based on an estimated 55,540,000 subscriber units ($\$0.32 \times 55,540,000 = \$17,772,800$, \$320,000 in excess of the industry's obligation because of rounding-up).

As CTIA explained in its Comments, the correct number of CMRS mobile services units for the date ending December 31, 1998 is 69,200,000 not 55,540,000. The Commission's error is not subject to interpretation and is obvious to even the most casual observer. The number of

⁷ Report and Order at ¶¶ 25-26.

units estimated by the Commission for FY 1999 is exactly the same estimate relied on by the Commission for the FY 1998 fees. In other words, the Commission's estimated fee for FY 1999 is based on the assumption that there has been zero growth in the number of subscriber units in the CMRS industry since December 31, 1997. Clearly, this is not the case. In fact, CMRS is one of the fastest growing sectors of the telecommunications industry. As the Commission itself concluded less than one week after releasing the Report and Order, "[a]s of December 1998, the [CMRS] market had over 69.2 million subscribers, an increase of 25 percent over the 55.3 million subscribers reported in the Third Report for December 1997."⁸ Yet for regulatory fee contributions, the Commission inexplicably assumes that there has been zero growth in the industry over the last year.

In response to CTIA's comments, the Commission simply states that "[i]n determining its estimates of the number of payment units, the Commission consults several sources, if available. We have found that there are often large disparities in the estimates provided by various industry associations."⁹ The Commission, however, offers not even a single citation, let alone evidence of the "several sources" it has consulted. The Report and Order provides no basis for disregarding CTIA's information, nor does it document even a single disparity between CTIA's calculation and

⁸ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report, FCC 99-136, at 8 (rel. June 24, 1999) (emphasis added) ("Fourth Competition Report").

⁹ Report and Order at ¶ 26. As noted, *infra*, CTIA offered various support for its calculation that there are 69.2 million CMRS subscriber units, including the calculations of several investment and research firms.

other published data. Rather, the Commission's determination is a results-oriented conclusory statement that does not even attempt to find support in the record.¹⁰

CTIA offered various support for its calculation that there are 69.2 million CMRS subscriber units. It provided the Commission with the most recent version of its annual survey, the most comprehensive source for data for the wireless industry.¹¹ CTIA also provided the calculations of several investment and research firms, including Merrill Lynch and Donaldson, Lufkin, & Jenrette, which independently concluded that there were roughly 69 million CMRS subscribers at year-end, 1998. Perhaps most telling, CTIA reminded the Commission that Chairman Kennard had stated in February of this year that "there are over 68 million Americans who own a mobile phone."¹²

As mentioned above, only six days after releasing the Report and Order, the Commission presented to Congress its own detailed analysis of the CMRS industry.¹³ In the Fourth Competition Report, not only did the Commission conclude that "[a]s of December 1998, the [CMRS] market had over 69.2 million subscribers, an increase of 25 percent over the 55.3 million

¹⁰ The Commission cannot contend that there is some sort of a misunderstanding over the definition of "units" because it quoted verbatim from CTIA's Comments. Compare Report and Order at 9, n.3, and CTIA Comments at 2, n.5.

¹¹ Comments at 7, Attachment.

¹² Comments at 7-8 (quoting Chairman William E. Kennard, Crossing Into the Wireless Century, New Orleans, LA, CTIA Convention, Feb. 9, 1999). Surely the Commission is not suggesting that the wireless industry grew nearly twenty-five percent in the five weeks between December 31, 1998 and February 9, 1999.

¹³ Fourth Competition Report.

subscribers reported in the Third Report for December 1997,"¹⁴ the Commission also observed that "[i]n numerical terms, this is the largest 12-month increase in the history of the mobile telephone sector. This level of subscribership translates into nearly 26 percent of the country's population."¹⁵

In a separate report prepared in June 1998, "to provide answers to some of the most frequently asked questions about the telephone industry -- questions asked by consumers, members of Congress, other government agencies, telecommunications carriers, and members of the business and academic communities,"¹⁶ the Commission concluded that there were almost 61 million CMRS subscribers.¹⁷ Thus, six months before the December 31, 1998 cut-off date to determine regulatory fees contributions, the Commission officially recognized that there were over five million more subscribers than the Commission used to calculate FY 1999 fees.

It is fundamentally insupportable for the Commission to rely on one calculation of CMRS subscribership to satisfy its reporting requirements, and another to assess regulatory fees. The Commission cannot pick and choose in this fashion. Perhaps recognizing that it is indeed insupportable, the Commission offers an alternative basis for maintaining its significantly lower estimate. It states that its "experience with industry estimates in prior years has resulted in high levels of underpayment in the CMRS category. Given the fact that we are required by the statute

¹⁴ Fourth Competition Report at 8 (emphasis added); see id. at Table 1, at B-2 in Appendix B; Table 5 at B-7; and Table 6 at B-8.

¹⁵ Id.

¹⁶ Trends in Telephone Service, Industry Analysis Division at 1-1 (rel. Feb. 1999) (emphasis added).

¹⁷ Id. at 2-3.

to collect 'an amount that can reasonably be expected to equal the amount appropriated . . . ' we have proposed to establish estimates that more closely match the number of units for which payments have been received."¹⁸ In other words, the Commission believes that, based on collection history, it will only collect fees for 55,540,000 subscribers in FY 1999. This conclusion, however, just like the zero-growth assumption, is not supported by any facts or the Commission's own data. Indeed, it is unclear whether the Commission is even able to determine the level of payments by CMRS providers in prior years.

A recent report by the Commission's Office of Inspector General ("OIG") found that the Commission's record keeping of its regulatory fees collection and the Wireless Telecommunications Bureau's databases are so poor as to be unauditale. The OIG Report concluded that "the FCC cannot attest to which FCC CMRS licensees have paid annual regulatory fees."¹⁹ Specifically, the OIG Report stated that

the Commission has focused on meeting congressionally mandated regulatory fee collection thresholds and has not established a system of records which would allow the Commission to validate CMRS regulatory fee payments to ensure that they are current, accurate, and complete. Thus, the Commission lacks the basis to identify CMRS licensee compliance with Public Law 103-66 and annual Public Notices that establish regulatory fee filing fee requirements and payment windows.²⁰

¹⁸ Report and Order at ¶ 26.

¹⁹ Special Review Report Audit of Commercial Mobile Radio Service (CMRS) Regulatory Fees, Office of the Inspector General, <<http://www.fcc.gov/oig>> ("OIG Report").

²⁰ Id.; see also "FCC To Spend Millions to Fix Tangled Databases," Telecommunications Reports Wireless, July 8, 1999 at 9 ("FCC officials . . . describe[d] how incompatible computer systems not only prevent the agency from keeping track of fee revenue but also lead to overcharges and undercharges of licensees.").

The OIG Report concludes that "[b]ased upon the results of this assessment, [OIG] could not place reliance on the CMRS data contained in either the licensing system maintained by WTB or the collection system maintained by OMD."²¹ Amazingly, the very same Office of the Managing Director that agreed with the conclusions reached by OIG is now relying on previous years' collection data, even though it has admitted that they are not verifiable, as a basis for ignoring indisputable facts presented by CTIA.

Not only is it improper for the Commission to rely on collection figures found to be unverifiable by its own Office of Inspector General, a rudimentary analysis of those figures does not support a nearly 20 percent reduction in the estimated number of subscribers for FY 1999. Assuming, *arguendo*, the validity of the Commission's own data, the CMRS industry in 1998 fell short of the Commission's estimated collection by only 1.5 percent.²² There is no basis, either in the record, or in the Report and Order, to believe that this year carriers in the industry will not pay almost all, if not the entire amount, of the fees they owe.

If, in fact, there is significant under-collection from any particular industry segment, the Commission's proper recourse is to begin enforcement proceedings under section 9(c) against individual carriers, including the statutory 25 percent penalty for fees not paid in a timely manner. The Commission is not permitted to over-collect in one fiscal year to compensate for under-collection in a previous year. Under section 9(a), Congress permitted the Commission to collect fees "only in the total amounts, required in Appropriations Acts."²³ It was not Congress' intent to

²¹ OIG Report (emphasis added).

²² Report and Order at ¶ 26 (in 1997, the difference was 15 percent, in 1996, the difference was 18 percent, and in 1995, the difference was 2 percent).

²³ 47 U.S.C. § 9(a)(2).

allow the Commission to impose additional fees on those carriers that pay their annual fees to compensate for those carriers that may not be satisfying their legal obligations.²⁴ This is a legally impermissible and flawed policy decision.

The Commission should reconsider its decision and recalculate FY 1999 regulatory fees for CMRS mobile services based on the correct number of units, 69,200,000.

B. Minimum Standards Of Administrative Law Require The Commission To Explain The Basis For Its Decisions.

In addition to the clear factual error in its calculation of CMRS subscriber units, the Commission also dismissed CTIA's objection to the methodology utilized to calculate annual fees without any explanation whatsoever. CTIA demonstrated that the methodology used by the Commission impermissibly imposed a disproportionate share of the regulatory fees on the most rapidly growing sectors of the telecommunications industry.²⁵ CTIA stated that "[t]he fundamental flaw in the Commission's methodology is an implausible assumption that results in the imposition of disproportionate costs on sectors experiencing growth."²⁶ In response, the Commission simply restated its methodology. It did not contend that CTIA did not understand it, or that CTIA was in error. Rather, in less than a single line, the Commission concluded that "[n]othing in CTIA's argument convinces us that we erred in our methodology."²⁷ Perhaps

²⁴ Instead of seeking a twenty-five percent penalty for late payment from a very small number of carriers, if indeed there are any that do not pay their regulatory fees, the Commission has chosen instead to impose a fifty percent penalty on CMRS carriers who comply with the regulatory fee schedule and make timely payments

²⁵ CTIA Comments at 2-5.

²⁶ CTIA Comments at 3.

²⁷ Report and Order at ¶ 24.

emboldened by the provision of Section 9(a)(3) that limits judicial review,²⁸ the Commission has not even attempted to address this matter adequately.

Under well settled principles of administrative law, the Commission is required to adequately explain its decisions.²⁹ The D.C. Circuit has held that "[a]n agency must . . . 'examine the relevant data and articulate a satisfactory explanation for its action.' Accordingly, we will not uphold an agency's action where it has failed to offer a reasoned explanation that is supported by the record."³⁰ The Commission's facile resolution of the complex relationship between its regulatory fees and those industry sectors experiencing growth is insufficient to satisfy the requirements of law. Simply stating that it is unconvinced does not "provide an explanation that will enable the court to evaluate the agency's rationale at the time of the decision."³¹

In its comments, CTIA provided the Commission with well-reasoned explanations supporting a review of the methodology it utilizes for imposing annual regulatory fees. The Commission, however, apparently failed to seriously consider any of these issues. The Commission should now take the opportunity to revisit this matter and establish equitable contributions that are based on the cost of regulation, as Congress clearly intended.

²⁸ 47 U.S.C. § 159(a)(3).

²⁹ See 5 U.S.C. § 706(2)(A) (The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

³⁰ American Telephone and Telegraph Co. v. FCC, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)).

³¹ Dickson v. Secretary of Defense, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (quoting Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 654 (1990)).

III. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission reconsider its Report and Order, and adopt a new FY 1999 regulatory fee of \$0.20 per subscriber for CMRS mobile services.

Respectfully submitted,

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August 2, 1999

CERTIFICATE OF SERVICE

I, David M Don, do hereby certify that on this 2nd day of August, 1999, copies of the foregoing Petition for Reconsideration of The Cellular Telecommunications Industry Association were delivered by hand or first-class, postage prepaid mail as indicated to the following parties:

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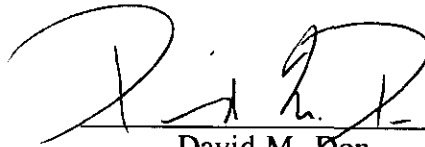
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A handwritten signature in black ink, appearing to read "David M. Don", is written over a horizontal line.

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